Supreme Court, U.S.
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No. 96-286

In The

Supreme Court of the United States

October Term, 1995

CITY OF ALBUQUERQUE, and TONI MARTORELLI, in her official capacity as Director of Family and Community Services for the City of Albuquerque, and MARK SANCHEZ, in his official capacity as Deputy Director of Family and Community Services for the City of Albuquerque, and KATHLEEN STARK, in her official capacity as Supervisor, Bear Canyon Senior Center, City of Albuquerque,

Petitioners,

versus

CHURCH ON THE ROCK and PASTOR DON KIMBRO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The respondents in their opposing brief in No. 96-286 argue two points that require response: that the enforceability of the Older Americans Act was not raised nor preserved below, and the respondents' recitation of the facts.

ARGUMENT

I.

THE ENFORCEABILITY OF THE OLDER AMERICANS ACT WAS RAISED AND DECIDED BELOW.

The issue of the enforceability of the Older Americans Act was expressly determined by the United States Court of Appeals for the Tenth Circuit. The issue was thoroughly argued and reargued by petitioners throughout the proceedings before the district court and the court of appeals. The respondents have consistently ignored the entire issue, instead staking their claim on the Free Speech Clause. It is simply too late in the game for the respondents to now attempt to assert that the statutory issue does not exist.

The constitutionality and enforceability of the funding condition in the Older Americans Act was *both* pressed by the petitioners below *and* passed upon by the court of appeals. As a matter of constitutional law, and central to its holding, the court of appeals held that the City's enforcement of the Older Americans Act "does not shelter [the City policy] from constitutional scrutiny" and that such enforcement was not a compelling governmental interest. Pet. App. 12a. The court of appeals has declared that enforcement of the Act is unconstitutional, in clear conflict with this Court's view in *Tilton v. Richardson*, 403 U.S. 672 (1971).

In their brief before the court of appeals, the petitioners emphasized and reemphasized that the City's policy was designed to enforce federal law, and that the federal law was coextensive with the Establishment Clause. In declaring the Act unconstitutional, the court of appeals has now challenged the power of Congress to implement the Establishment Clause, thus giving rise to the question presented for review.

Following are extensive excerpts from the petitioners' brief before the court of appeals, which illustrate the fact that petitioners thoroughly presented the statutory issue before that court:

RESPONSE TO THE APPELLANTS' STATEMENT OF ISSUES PRESENTED FOR REVIEW

The trial court announced its decision simply and succinctly in two parts. First, the court held that the City of Albuquerque's policy against "sectarian instruction" and "religious worship" was permissible regardless of the nature – public or nonpublic – of the forum. The court premised its holding on the Older Americans Act, which defines the purposes of senior centers; the court found that the statutory purposes did not include the type of speech being proposed by appellants. (Aplee. Br. p. 1.)

* * *

STATEMENT OF THE CASE AND RELEVANT FACTS

The City of Albuquerque ("City") maintains a policy disallowing "sectarian instruction" and "religious worship" at its senior centers. This policy was enacted pursuant to the Older Americans Act ("Act"), which requires as a condition of federal grants that senior centers not be used for such purposes. 42 U.S.C.A. § 3027(a)(14)(A)(iv). Aplt. App. at 119. (A copy of § 3027(a)(14)(A)(iv) is attached hereto as Exhibit "A".)

City senior centers receive funding under the Act from the federal government, channeled through the New Mexico State Agency on Aging. The money is used, among other purposes, to renovate senior centers. Aplee. Supp. App. at 6; Aplt.

App. at 936.1 and 937. The Act establishes the basis for the City's policy.

(Impact on listeners of the appellants' speech is not the basis for the City policy; the basis is § 3027. . . .) (Aplee. Br. p. 3.)

* * *

The Act further defines the purposes of senior centers. 42 U.S.C.A. § 3002(35). (A copy of § 3002(35) is attached hereto as Exhibit "B".) (Aplee. Br. p. 3.)

* * *

In line with the purposes established by federal law, the City restricts use of its senior centers by excluding – in addition to "sectarian instruction" and "religious worship": groups that are not composed of at least 75 percent seniors; for-profit businesses; political campaigners; solicitation, and groups whose purpose are not for the study of or discussion of senior citizen issues. Aplt. App. at 119-121; 910-917. (Aplee. Br. p. 4.)

* * *

Moreover, the appellants conveniently neglect to tell the Court that Mr. Perdue qualified his answers in most, if not every instance, by testifying that the appellants' hypothetical examples would only be allowed if they were permitted under federal law (42 U.S.C.A. § 3027) as not being sectarian instruction or religious worship. See, e.g., Aplt. App. at 837, L.10-13 and 839, L.13-16. (Aplee. Br. p. 7.)

* * *

ARGUMENT

I. SUMMARY AND INTRODUCTION. (Aplee. Br. p. 10.)

* * *

Appellants' Brief is silent on two key issues: application of 42 U.S.C.A. § 3027, and of the defense of the Establishment Clause.

Appellants offer no rebuttal or legal authority to the effect that § 3027 does not apply, except to meekly state that the statute is preempted by the First Amendment. Appellants fail to respond, as they did in the district court, to arguments that the religious prohibitions of § 3027 implement the Establishment Clause and that the very language of these types of federal grant statutes have been held constitutional. (Aplee. Br. p. 11.)

* * *

II. THE DISTRICT COURT CORRECTLY HELD THAT THE CITY PROPERLY EXCLUDED APPELLANTS' SPEECH BECAUSE IT WAS NOT WITHIN THE INTENDED PURPOSES OF THE SENIOR CENTERS. (Aplee. Br. p. 14.)

* * *

A. The Statutory Background for the City Policy.

Title III, Section 307(a)(14)(iv), of the Older Americans Act (42 U.S.C.A. Section 3207(a)(14)(iv)) provides that agencies that receive federal money for senior centers must assure the federal government that a senior center "will not be used and is not intended to be used for sectarian instruction or as a place for religious worship." The City policy at issue in this case is a verbatim reflection of this statute, and was drafted pursuant to its

commands. Aplt. App. at 119, 3. Title III funds are received by the City for use in senior center renovation and other uses. Aplee. Supp. App. at 6; Aplt. App. at 936.1 and 937.

This statute is echoed in regulations of the United States Office of Management and Budget governing Grants for State and Community Programs on Aging. The regulations flatly provide: "Senior centers may not be used for sectarian instruction or religious worship." 50 Fed. Reg. 1650, § III(A). (A copy of this regulation is attached hereto as Exhibit "C".)

The language of the City policy, and of its parent federal statute, is a standard requirement of a wide variety of federal grant statutes. See, e.g., 20 U.S.C.A. § 1021; 20 U.S.C.A. § 1213d; 20 U.S.C.A. § 2397c; 25 U.S.C.A. § 1803; 29 U.S.C.A. § 1577; 42 U.S.C.A. § 2753; 42 U.S.C.A. § 5001.

In *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court upheld the general constitutionality of this type of regulation. At issue was the Higher Education Facilities Act of 1963, which authorized grants for expansion of college facilities, but prohibited monies for "any facility used or to be used for sectarian instruction or as a place for religious worship. . . . " In fact, the only part of the statute that the Court found unconstitutional was a 20-year restriction on the exclusion of sectarian uses. The Court struck down that restriction because it was "inadequate to ensure that the impact of the federal aid will not advance religion." 403 U.S. at 682.

Similarly, in *Fordham University v. Brown*, 856 F. Supp. 684 (D.D.C. 1994), the Court held that the federal government, in attempting to comply with the First Amendment, legally promulgated regulations barring use of federally funded broadcast equipment for essentially sectarian purposes. The Court quoted the government's position, which can be said to represent the City's defense in the case at

bar, as follows: "We have a responsibility to see that this [grant] program is not turned to narrow private purposes in contravention of the letter and intention of the Act, a responsibility which assumes Constitutional dimensions where use of facilities for sectarian purposes would violate the Establishment Clause of the First Amendment." 856 F. Supp. at 691. See also *Roemer v. Board of Public Works*, 426 U.S. 736 (1976).

Thus, the City policy is identical to a constitutional federal statute in language and intent, and is designed to ensure compliance with that law. The appellants argue, nevertheless, that the Free Speech Clause "trumps" the statutory restrictions of § 3027. However, this argument ignores the fact that § 3027 implements the Establishment Clause, which is in itself a compelling government interest justifying restrictions on speech.

As stated in *Fordham University, supra*, 856 F. Supp. at 691 in interpreting a similar statute: "Applicants with religious affiliations will be expected to show that both the applicant organization and its proposed services will be nonsectarian in nature. By 'nonsectarian' we mean that they do not have the function or purpose of advancing or propagating a religious belief. (citing *Tilton* and its companion case, *Lemon v. Kurtzman*, 403 U.S. 602 (1971))." A violation of the Establishment Clause is a compelling state interest justifying abridgement of the rights of free speech. *Widmar v. Vincent*, 454 U.S. 263, 271 (1981); *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517, 522 (9th Cir. 1994); *Doe v. Small*, 934 F.2d 743, 759 (7th Cir. 1991) ("A government may not evade the constitutional obligations imposed by the Establishment Clause by seeking refuge in the protective mantle afforded to private actors by the freedom of speech and expression clause of the First Amendment"). (Aplee. Br. pp. 14-17.)

* * *

B. The District Court Properly Found the Appellants' Speech to be Within the Prohibition of Section 3027 and the City Policy as "Sectarian Instruction" or "Religious Worship". (Aplee. Br. p. 17.)

* * *

The City's position is that "sectarian instruction" and "religious worship" under § 3027 is coextensive with the Supreme Court's identification of conduct that violates the Establishment Clause. As stated in *Fordham University, supra*: By "nonsectarian" we mean that they do not have the function or purpose of advancing or propagating a religious belief." 856 F. Supp. at 691. (Aplee. Br. p. 18.)

* * *

C. The District Court Correctly Concluded That Appellants' Speech Was Not Within the Purposes of Senior Centers and Could Be Properly Excluded.

The Older Americans Act defines senior centers as essentially places where "a broad spectrum of *services*" (emphasis added) are available to senior citizens. 42 U.S.C.A. Section 3002(35). Aplt. App. at 910. See *Calash v. City of Bridgeport*, 788 F.2d 80, 83 (2nd Cir. 1986) (property dedicated as a "service facility" held nonpublic). Senior centers are not defined as forums for expression, let alone religious proselytizing. In fact, the federal government has specifically forbidden this type of speech in senior centers. 42 U.S.C.A. Section 3027. (Aplee. Br. p. 21.)

* * *

III. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE CITY'S POLICY WAS VIEWPOINT NEUTRAL.

(Aplee. Br. p. 37.)

* * *

> The appellants do not dispute that sectarian instruction and religious worship are forbidden in senior centers by 42 U.S.C.A. § 3027 and City's policy that implements that statute. The "purpose" of senior centers is not to provide a forum for sectarian proselytizing. Federal law defines senior centers as "a community facility for the organization and provision of a broad spectrum of services, which shall include provision of health (including mental health), social, nutritional, and educational services and the provision of facilities for recreational activities for older individuals." 42 U.S.C.A. § 3002(35).

In the proceedings below, the issue of the validity of § 3027 as a Congressional expression of the limits of the Establishment Clause was at the heart of the petitioners' defense. The petitioners clearly pressed the issue of the enforceability of § 3027 and the court of appeals clearly held that § 3027 unconstitutional as a justification for the City's actions. Thus, this Court can, and should grant certiorari on the issue presented for review. *United States v. Williams*, 504 U.S. 36, 41 (1992).

II.

THE RESPONDENTS MISSTATED THE FACTS

Respondents take great liberties with the facts in the record below and their misstatements of fact must be corrected in order for the Court to properly review the Petition for Certiorari. Essentially, respondents mold the facts into a form that creates the result they desire with no connection to the facts actually in the record. Respondents state that any expression is allowed at the facilities as long as it is of

interest to seniors. Brief in Opp., pp. 1-2. This misrepresentation of senior centers creates the image of a public forum with no regulation of speech. However, Congress has chosen to extensively regulate the creation and administration of the programs at City senior centers. (See Pet., pp. 20-24.) It is this legislative framework that delineates the purposes of senior centers, defines the requirements for senior center programs and results in the pervasive sponsorship by the City of programs at those centers.

All of the classes reviewed by respondents at pages 6-9 of their Brief in Opposition occur as part of a City-sponsored program mandated and regulated by the Older Americans Act. Pet. at 8 and 21-22.[1]

Neither *Rosenberger* nor *Lambs' Chapel* require that federally funded senior centers allow a Pastor of Discipleship to proselytize to participants in their government-sponsored curriculum. (The respondents offer not one factual iota to rebut the petitioner's point that respondents sought access to this very program as an "outside" religious organization, and did not seek use of the facilities after-hours.)

The importance and substantiality of the question presented has not been denied by the respondents. Their claim that the issue was not raised nor preserved below is rebutted by the record and by the opinion of court of appeals itself. In light of the respondent's inability to face the issue presented,

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[1] On pages 6 through 8 of their Brief in Opposition respondents misstate the facts in regard to two of the classes. On page 7, the Class on *New Testament Bible Study* was cancelled because of its possible violation of City policy as sectarian instruction. Aplt. App. at 1474. The *Passover Commemoration* was not an activity even held at a Senior Center, it was an in-town senior trip held at another location. Aplt. App. at 688. In fact, the program was not a religious service but a musical performance of a Handel Oratorio, *Israel in Egypt*. None of the classes held at the senior centers contained religious worship or sectarian instruction.

the need for plenary review of the action below is indisputable.

Respectfully submitted,

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